

63
FEBRUARY 14 1771.

P^r Mr. Anthony Philip Miller

Unto the Right Honourable the Lords of Council and Session,

THE
P E T I T I O N

O F

Mr. ANTHONY PHILIP MILLER, Oculist, now
in Edinburgh, and MARY ANGELO-TRE-
MAMONDO, his spouse,

Humbly sheweth,

THAT your petitioner, Mr. Miller, a native of Germa-
ny, humbly addresses himself to the judges of this coun-
try, as a foreigner, who demands the protection and aid
of its laws. As he does not mean to offend, by fulsome
flattery, a charge too often imputed to artists, and others, from
the continent, who visit Great Britain, your Lordships will allow
him to say that he has heard much of Scotland. He has read the
honourable acknowledgment by an Englishman of rank and dis-
tinction, *Mr. Horace Walpole*, "that the Scottish nation is the
"most accomplished nation in Europe; the nation to which, if
"any one country is endowed with a superior partition of sense,
"he should be inclined to give the preference in that particular."
Has not then your petitioner reason to hope for relief from the
laws of such a nation? especially as he understands that the spirit
of those laws is derived from the great fountain of Roman juris-
prudence, from whence the laws of almost every country in
Europe are derived; so that a foreigner will have the pleasure to
find, that the laws over which your Lordships preside, are much
congenial with the laws of his own country.

A

Your

15th Feb^r 1771

See

26th Feb^r 1771

Adhere

Your petitioner having been so happy as to perform a very successful operation on one of the eyes of Signor Francis Angelo Tremamondo, Master of the Royal Academy at Edinburgh, by which that gentleman was restored to the perfect use of his sight, when threatened with a total loss of it, an intimacy thence ensued between your petitioner and him: from that intimacy, Signor Angelo brought about a marriage between his daughter and your petitioner, which has most unexpectedly involved your petitioner in a law-suit.

For, Mr. Angelo observing, with a conscious satisfaction, your petitioner's liking for his daughter, took an opportunity, with much smooth and insinuating address, to tell your petitioner, that he was only sorry not to be a man worth 20,000 l. for, in that case, he would give your petitioner 10,000 l. with his only child.

Your petitioner had not then made any particular enquiry into Mr. Angelo's circumstances; he knew, indeed, that he was not able to give his daughter any thing like 10,000 l. but he knew that he was master of the Royal Academy of Edinburgh, with a genteel salary, and that he had, besides, a considerable number of scholars; and he, upon the whole, judged, that Mr. Angelo, though not opulent, had yet, what may be called, an easy handsome fortune, for a man in his station; but it was yet too soon to be explicit as to settlements; there would be time enough for that when it was known, whether or not the young Lady would consent to the match.

This was not long of being known. Mr. Angelo, in a very few days after, came to your petitioner, and assured him, that Miss Angelo was ready and willing to be his wife. Your petitioner accompanied Mr. Angelo home, and had the pleasure of hearing this confirmed by the young Lady herself.

Now was the time to talk of money-matters; and accordingly Mr. Angelo and your petitioner had a serious communing upon that subject. Mr. Angelo expressed his regret, that his fortune did not enable him to bestow, with his daughter, what he wished; but he COVENANTED AND AGREED "That, in the event of the marriage taking place, he would give to the petitioner a diamond ring, worth fifty guineas, or, in place thereof, fifty guineas; a gold snuff-box, worth thirty guineas; that he would furnish to, and set off, in all manner of wearing-apparel, his said daughter, so as to have

" no

"no need of any, for two years after the marriage; and that he
 "would give to her thirty guineas worth of lace; that he would
 "furnish a house compleatly to the petitioner, and that he should
 "have his choice, either to take the red or green bed, &c. which
 "were in Mr. Angelo's house; and his said daughter, as being his
 "only child, should have the half of every thing then in his house,
 "as plate, furniture, kitchen-utensils, linen, &c. and that he would
 "furnish the petitioner, and his said daughter, in bed, board, and
 "lodging, a whole year, without any gratification whatsoever
 "therefor."

Your petitioner must confess, that these terms were by no means such, as he had reason to expect. However, as Mr. Angelo talked of the situation of his affairs with an appearance of much openness and candour; and, as your petitioner had, besides, a real regard for the young Lady, he did not push Mr. Angelo farther, but consented to accept of the above stipulations, and proceeded to perform his part of the contract, by marrying Miss Angelo; and, for some time, there was no dispute with regard to the terms of this mutual contract; for Mr. Angelo, a considerable time after the marriage, acknowledged them to several respectable witnesses.

Mr. Angelo, however, having refused to implement his part of this contract, your petitioner and his spouse were laid under the necessity of bringing an action against him in this court.

The Lord Monboddo, ordinary, was pleased, on the 15th December 1770, to pronounce the following interlocutor: "Before Decem. 15, 1770.
 "answer, allows the pursuer to prove his libel, and all facts and
 "circumstances relative thereto; allows the defender to prove
 "such facts as he shall give in a condescendence of, before ex-
 "tract, and all facts and circumstances relative thereto; and al-
 "lows both parties a conjunct probation upon the whole, and,
 "for that end, grants commission, &c."

Mr. Angelo reclaimed; and your Lordships were pleased, on the 29th of January 1771, to pronounce the following interlocutor: "The Lords having advised the within petition, with the
 "answers thereto, they find the proof by witnesses not compe-
 "tent in this case, and therefore refuse to allow the same, and
 "remit to the ordinary to proceed accordingly." January 29, 1771

Against

Against this interlocutor a petition was preferred on the part of Mr. Miller and his spouse, within the reclaiming days, which your Lordships allowed to be withdrawn, and a new one to be given in, betwixt and the 16th current. In consequence of that indulgence, your petitioners now humbly beg leave to submit their cause to your Lordships re-consideration. They are advised, that it is a question in law, of very general importance, which has never before been agitated in this court.

The petitioners shall not take up your Lordships time with a repetition of the arguments and authorities stated for them, when the cause was last before your Lordships, as they are persuaded that Mr. Angelo will talk no more of *verbal promises*, and pretend to class, under that denomination, such a mutual contract as the one now in question. They shall confine themselves in this paper to the peculiar question now at issue, viz. the proof of a verbal contract of marriage, the particular species of contract, *de quo agitur* in this cause.

Your Lordships will be pleased always to keep in mind, that a proof, properly so called, a proof *prout de jure*, a *probatio ordinaria*, is, *que per instrumenta aut testes fit*; "In the mouth of two or three witnesses shall every word be established." The oaths of witnesses are undoubtedly a better mean of proof than the oath of a party, which is known to be one of the modes of a *probatio extraordinaria*, to which it is, in general, established, that a court of justice ought not to resort, if better can be had. The greatest requisite of evidence, which is intended for discovering and ascertaining truth, is, that, the witnesses, by whose testimony it is to be explicated, be impartial, and, consequently, credible. Now, there can be no doubt, that the oath of a party is the oath of the most partial witness; and, therefore, it is certainly a mean of proof the least satisfactory to the minds of judges of any that has been devised.

When no better can be had, no doubt the oath of a party must be taken; and your petitioner also knows, that the law of this country has provided, that, in certain cases, the only proof that is to be allowed is the oath of a party. It does not become him to impugn any part of the law of Scotland. As, however, a great Roman lawyer candidly acknowledged, that, *omnium que a majoribus constituta sunt ratio reddi non potest*, there are, perhaps, lawyers

yers here, who will be as candid with regard to some things in the Scottish code. But this much your petitioner may, with humble confidence, maintain, that your Lordships will not be disposed to extend the proof by the oath of a party, farther than positive law lays you under an obligation to do.

Your petitioner is advised, that all bargains or mutual contracts concerning moveables, may, by the law of Scotland, be proved by the oaths of witnesses; and, upon that general principle, he does humbly plead, that the mutual contract, for implement of which he is pursuing, may be so proved. Your Lordships have now before you, for the first time, this question, May a *pactum dotale* be proved by witnesses or not? The resolution of which question must, in your petitioner's humble apprehension, depend upon this, whether a *pactum dotale* be an exception to the general rule, as to bargains concerning moveables?

This, your petitioner does humbly maintain, is not the case; for, upon looking into the writers upon the law of Scotland, no such thing appears.

My Lord Bankton, in his title upon *obligations conventional*, thus lays it down: "Writing is essential to divers contracts and deeds; for all matters concerning heritage, tacks beyond a year, and conveyances of such deeds, require writing, as a necessary solemnity to their perfection, book 1. tit. 11. § 23."

And Mr. Erskine, in his title of obligations, by word or writ, book 3. tit. 2. § 2. observes, "Writing must necessarily intervene, in all obligations and bargains concerning heritable subjects, though they should be only temporary, as tacks, which, when they are verbal, last but for one year." And, a little after, he observes, "Writing is also required in testaments;" but not a word is said by either of these writers with regard to the *pactum dotale*.

Now, with submission, is it possible to conceive, that, if a *pactum dotale* were understood in the law of Scotland to be one of those mutual contracts, concerning moveable commodities, which are not probable by witnesses, is it possible to conceive, that both these learned writers would have omitted to have taken notice of it? Surely no. Your petitioner then humbly thinks himself intitled fairly to argue that, in this case, which is a contract con-

cerning moveable commodities, *exceptio firmat regulam in rebus non exceptis.*

What has been above stated appears to be decisive against the principle assumed by the defender, that a *pactum dotale* is not probable by witnesses, because it ought to have been executed in writing; for, if the lawyers of this country, when treating, *ex professo*, of conventional obligations, and there enumerating the several exceptions to the general rules upon that subject, have not mentioned the *pactum dotale* as an exception; it seems, with great submission, to be rather hard to make a stretch, and include the *pactum dotale* as an exception.

But, farther, your petitioner is advised, that, when the law of Scotland is silent, the civil law is adopted by your Lordships; and, in that law, it is expressly laid down, that a *pactum dotale* does not require writing, and may be proved in the ordinary way and manner that other bargains may be proved.

The learned Voet, when expounding the title *de pactis dotalibus*, writeth as follows: "Neque ad pactorum horum dotalium perfectionem scriptura opus est, si modo aliunde illa probationem habeant. 6. C. de dotis promissione, l. unic. § 1. et § ult. in fine C. de rei uxoris act. l. cum citra 15. C. de jure dot. novel. 117. cap. 4. Licet enim sapissime instrumentorum dotalium in jure nostro mentio sit, non tamen eorum adhibendorum necessitas invenitur imposita, paucis exceptis casibus singularibus, firmantibus communes juris regulas in casibus non exceptis, secundum quas scripturæ fiunt, ut quod actum est facilius probari possit; cæteroquin et sine scripto valent, quæ acta sunt, si aliunde habeant probationem." And, after mentioning, that "Casus vero excepti fuerunt, si illustres personæ Romanæ, non barbaræ, matrimonium contraherent. Si quis libertinam suam duceret in uxorem, ac denique, si imparis conditionis homines matrimonio jungerentur;" none of which exceptions, surely, the defender will say, are applicable to the present case; the learned commentator proceeds to observe, "Hoc vero jus, quod nempe scriptura ad validitatem pactorum dotalium non absolute necessaria sit, moribus quoque hodiernis multorum probatum est."

Mascardus *de probationibus* is more explicit in favour of the doctrine maintained by your petitioner. He first observes, that, "Probationes

" Probationes quæ alias non recipiuntur, favore dotis admittantur, Conclus. 566. No. 2." and he has the following passage, directly to the case in hand: " Dotis datio, si de ea non appareat instrumentum, potest probari per testes, Conclus. 569. No. 1." Nay, farther, in the same conclusion, No. 2, he says, " Etil lege municipali caveatur intra certam summam probari non posse per testes, sed per instrumenta, licet dos excedat dictam summam præscriptam a statuto, poterit tamen per testes probari."

If, then, the portion covenanted to be given with a woman in marriage, is viewed in so very favourable a light, in foreign countries, where the Roman law prevails, that proofs, which would be otherwise incompetent, will be admitted to establish it, your petitioner does humbly contend, that, in this country, where the Roman law does also prevail, though your Lordships should not be disposed to go all the length that Mascardus does, who, upon the principle that, *Dos est causa pia*, allows it such extraordinary privileges, you will at least be unwilling to narrow and cramp the evidence.

With great submission, there is nothing in the *pactum dotale*, which should take it out of the general rule, as to bargains concerning moveables. It is surely a lawful bargain; and, whatever refined notions some people may entertain, it is nevertheless very certain, that, in the present state of human society, the *dowry* is generally considered as an essential requisite in a contract of marriage. A contract of marriage is a *contractus innominatus*, *Do ut facias*; and it appears exceedingly hard, that, when your petitioner *fecit*, has done it, has married the woman, has performed his part of the contract, *res non sunt integræ*, the law should deny him its full aid to recover the *dos*, to force his father-in-law to perform the counter part of the bargain.

My Lord Bankton, vol. 1. page 353, says, " Bargains about moveables, for the benefit of commerce, are sustained, without writing, to the greatest extent, and may be proved by witnesses." And, surely, as much favour is due to a marriage-contract, as to any commercial one. It is a contract in the lawful commerce between the sexes, the most necessary commerce of any; and why should not bargains, concerning moveables, in the course of that commerce, be probable by witnesses, as well as any other bargains concerning moveables? The law has not made them an exception,

exception; and, with great submission, there appears no good reason why your Lordships should do it.

What is there so sacred in bargains concerning moveables *matrimonii*, that they alone should be excepted from the general rule of evidence? Marriage itself may be very sacred; but it does not occur, that the money or goods, bargained for, on occasion of marriage, should be considered in that light. It has been said, that, if the doctrine pleaded for your petitioner should be sustained, sums, to any extent, might be proved by witnesses to have been contracted for, in the view of a marriage taking place. And why, with great submission, why not? Your petitioner holds it to be law, that a conventional obligation to pay any sum of money, upon a certain condition being performed, may be proved by witnesses, and must stand good, unless it be a *turpe pactum*, or enorm lesion, or fraud can be qualified.

Your Lordships will be pleased to consider, that marriage itself is probable by witnesses; and, therefore, it seems rational that the conditions of a marriage may also be so proved. Will your Lordships allow a proof, by witnesses, of the principal, and deny it to its accessories? Had your petitioner been base enough to deny his marriage with Mr. Angelo's daughter, witnesses would have been called to prove it; and those witnesses would have told, in the course of their examination, the very circumstances which your petitioner is now desiring to prove. Is it not then exceedingly hard, that your petitioner, when acting honestly and uprightly, should be in a worse situation? He is an entire stranger in this country; he came to it at the earnest solicitations of Mr. Angelo, who has resided here for many years; he is himself of an open, unsuspecting, and generous temper, and, trusting to Mr. Angelo's good faith, as one who was acquainted with the laws and customs of the country, he did not insist that the contract between them should be reduced into writing. Shall Mr. Angelo, then, now be allowed to take advantage of your petitioner, and to come and say, in a court of justice, "Mr. Miller shall have nothing but my oath." Your petitioner cannot allow himself to think, that your Lordships, after reconsidering this cause, will restrict him to such a mean of proof.

And whatever may be the opinion of your Lordships, with regard to allowing a proof by witnesses, of marriage-contracts as
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to sums of great extent, because such are commonly reduced into writing; your petitioner humbly maintains, that a different rule should be followed with regard to such contracts as the one now in question. It is well known to your Lordships, that the common usage in Scotland is, that stipulations in the view of marriage, when the bride is to get only a few moveables, are not reduced into writing. It is covenanted and agreed, that a man shall get with her, perhaps, a good mare, a cow and a calf, a score of sheep, a bedding of clothes, some pieces of household-furniture, or other articles of a like nature; but your Lordships; it is believed, will not find written contracts as to such matters, from the earliest ages till the present time.

The preservation of ancient poetry is certainly no less rational than the preservation of ancient coins; for if the latter frequently contribute to rectify and ascertain the chronology of history, the former no less promotes our knowledge of the manners and customs of men in their respective periods. In the great question concerning the ancient peerage of *Sutherland*, now depending before the House of Lords, *Andrew Winton's* old rhymes are quoted amongst other proofs, authorities, and illustrations. Your petitioners might here quote some ancient Scottish poetry on occasion of weddings, and the method of adjusting *tochers*, in support of what they are maintaining; but, as the pieces they mean are in every body's hands, it is unnecessary.

They will appeal to the many men of business in this court, and over all Scotland, who have been employed in executing marriage-settlements, if it is customary to make out written contracts, when nothing else is contracted to be given with the bride but a few moveables, as what were termed *jocalia* in the Roman law, or other such things.

The case here, is just of that nature. Mr. Angelo agreed to give with his daughter, a ring, a snuff-box, a parcel of lace, some wearing-apparel, and some household-furniture, &c. Such a marriage-contract, does, with submission, fall under that species of marriage-contracts, as to which we are not so much as left in doubt, whether writing ought to intervene, because the universal practice of the country has established it, that in such cases writing is not used.

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It is therefore please your Lordships to alter your former interlocutor, and allow your petitioners a proof of their libel, and of all facts and circumstances relative thereto, prout de jure.

According to justice, &c.

JAMES BOSWELL, Master of

T O T H

James Boswell, Master of the Academy of Edinburgh, in Edinburgh.

The facts necessary for understanding the merits of this case, are few, the principles and precedents of law are various; both of them